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No. 88-311

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

EMPIRE LUMBER COMPANY,

Petitioner,

---against---

WASHINGTON WATER POWER COMPANY,

and

IDAHO PUBLIC UTILITIES COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

RESPONDENT IDAHO PUBLIC UTILITY COMMISSION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a PURPA qualified congeneration or small power production facility (QF) entitled to an immediate "lock-in" of state established avoided cost rates upon filing a self-certification notice of QF status with the Federal Energy Regulatory Commission (FERC)?

2. Do Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 USC 2601 et seq., 92 Stat. 3117) and the implementing federal regulations of FERC (18 CFR Ch. 1, Part 292) preempt the Respondent Idaho Public Utilities Commission from establishing reasonable regulations and requirements for the sale and purchase of power between regulated electric utilities (The Washington Water Power Company, Respondent) and QFs (Empire Lumber Company, Petitioner)?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

RESPONDENT IDAHO PUBLIC UTILITY COMMISSION'S BRIEF IN OPPOSITION

The respondent, Idaho Public Utilities Commission respectfully requests that this Court deny the petition for Writ of Certiorari, seeking review of the Idaho Supreme Court's opinions in this case, which opinions affirm the findings and Orders of the Respondent Idaho Public Utilities Commission. Those opinions and Orders are appended to Empire Lumber Company's Petition in this matter.

STATUTORY PROVISIONS INVOLVED

18 CFR §292.602 Exemption to qualifying facilities from the Public Utility Holding Company Act and certain State law and regulation.

(c) Exemption from certain State law and regulation.

(2) *A qualifying facility may not be exempted from State law and regulation implementing Subpart C* [Regulation of sales and purchases between qualifying facilities and electric utilities – 18 CFR §292.301-308] (emphasis added)

18 CFR §292.401 Implementation by State regulatory authorities and nonregulated electric utilities.

(a) State regulatory authorities. Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C (other than §292.302 thereof). Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such Subpart (other than §292.302 thereof).

STATEMENT OF THE CASE

A. Parties. The Petitioner, Empire Lumber Company (Empire), has filed notice as a self-certified small power production qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA), P.L. 95-617. See PURPA Sections 201, 210; 92 Stat 3117 (1978); 18 C.F.R. §§292.203(a), 292.204.

The Respondent, The Washington Water Power Company (Water Power), is an electrical corporation and a public utility subject to state regulation under the Public Utilities Law, Chapters 1-7, Title 61, *Idaho Code*. See I.C. §§61-104, 61-119 and 61-129. Water Power is also a state regulated utility within the meaning of PURPA. See PURPA §3(4), (17), and (18); 16 U.S.C. §2602(4), (17), (18).

The Respondent, Idaho Public Utilities Commission (Commission), is the state agency with regulatory authority over Water Power under both the Idaho Public Utilities Law and PURPA. See I.C. §61-501 *et seq.*; PURPA §3(16), (17); 16 U.S.C. §796(15), (21); 16 U.S.C. §2603(16), (17). The Commission has authority under PURPA and implementing regulations of the Federal Energy Regulatory Commission (FERC) to set "avoided costs," to order electric utilities to purchase energy from small power producers and to implement FERC rules. PURPA Sections 210, 210(a), 210(f), 16 U.S.C. §§824a-3, 824a-3(a)(f).

B. PURPA. Congress in 1978 as part of the National Energy Act passed the Public Utility Regulatory Policies Act (PURPA). P.L. 95-617, 92 Stat 3117 (1978). Its purpose was to encourage the promotion and development of renewable energy technologies as alternatives to fossil fuels and the construction of new generating facilities by electric utilities. *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402, 405, 103 S.Ct. 1921, 76 L.Ed.2d 22, 28 (1983). Section 210 of PURPA requires that electric utilities purchase power produced by qualifying cogenerators or small power producers that obtain qualifying status under Section 201. 16 U.S.C. §824a-3(b), (d).

As the state implementing arm of the Federal Energy Regulatory Commission (FERC), the Idaho Public Utilities Commission is directly or by necessary implication authorized to establish reasonable guidelines or standards governing the purchase of cogeneration or small power production by its regulated electric utilities. 18 C.F.R. §292.401. The Commission standards are not inconsistent with federal law; rather they are a lawful exercise of expressly delegated powers. As part of its unified regulatory scheme the Commission requires that signed power purchase contracts be presented to it for review, approval and lock-in of avoided cost rates. Alternatively, the Commission requires a showing of entitlement in a complaint action before it.

C. **The individual facts.** The avoided cost rates in effect for Water Power during the timeframe discussed in this case were initially the Schedule 62 rates established in Commission Case No. U-1008-190 (-190), Order No. 18988 issued July 6, 1984. The -190 rates were "final and conclusive" and remained in effect until supplanted by interim rates issued on January 14, 1986 in Commission Case No. U-1008-247 (-247), Order No. 20218. See *Idaho Code* §61-625.

Empire filed a complaint with the Idaho Public Utilities Commission on September 23, 1985 requesting that the Commission order Water Power to execute a long-term, fixed rate contract with Empire at the -190 avoided cost rates.

The Commission determined that Empire had failed to perfect its entitlement to the benefits of Commission

established -190 avoided cost rates. In addition, the Commission found that at no time was Empire "ready, willing and able" to sign a contract.

The Commission agrees with and adopts by reference the statement of facts as set forth in the majority opinion of the Idaho Supreme Court. 1987 Opinion No. 84 (Petition Appendix B, App. pp. 17-23), as now reported at 755 P.2d 1229. The Commission further incorporates by reference the statement facts as set forth in its own Order Nos. 20281 and 20693. Petition Appendix A, App. pp. 1-16. The notable facts and findings for purpose of this Brief in Opposition are as follows:

(1) The facts substantiate the Commission finding that at no time was Empire "ready, willing and able" to enter into a binding contract with Water Power. 755 P.2d at 1232.

(2) The facts substantiate the Commission finding that the output (size and capacity) of Empire's proposed facility is still an unknown, and that the claimed sizing of the facility is not based on the capacity or configuration of any known equipment. 755 P.2d 1229 at 1231.

(3) The facts substantiate the Commission finding that apart from filing a Notice with FERC, Empire has taken no action to acquire, design or construct a 9.9 MW facility. 755 P.2d 1229 at 1231.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Idaho Public Utilities Commission has the authority and jurisdiction to determine whether a qualifying facility has perfected its entitlement to the benefits of Commission established avoided cost rates.

Empire's contention that the Commission is prohibited from establishing standards and requirements for entitlement to contract and lock-in of avoided cost rates misinterprets the role of state regulatory commissions in implementing the rules and regulations of the Federal Energy Regulatory Commission. Empire's contention that the Commission's role in the regulation of sales and purchases between qualifying facilities and electric utilities is merely one of ratesetting ignores the unified regulatory scheme established by the Commission, regulations, requirements and standards that it is obliged to follow. 18 C.F.R. §292.602(c)(2). Understanding the role of the Idaho Public Utilities Commission in the area of cogeneration and small power production requires an understanding of the enabling provisions of state and federal law that impart authority and jurisdiction to it.

A. State Law

Pursuant to state statute, *Idaho Code*, Title 61, the Public Utilities Commission is the agency authorized and directed to supervise and regulate electric utilities. I.C. §§61-501, 61-129. Idaho Power is an electric utility and as such is subject to the jurisdiction, control and regulation of the Commission. I.C. §61-119. The Commission as part of its duties has the statutory authority to determine reasonable rates and to investigate and review contracts. I.C. §§61-502; 61-503. It also has the jurisdiction to hear

complaints against utilities alleging violation of any provision of law or of any Order or rule of the Commission. I.C. §61-612, *Afton Energy, Inc. v. Idaho Power Company*, 111 Idaho 925, 729 P.2d 400 (1986).

B. Federal Law - PURPA/FERC

In addition to the grant of authority under state law, the Commission has authority under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978, P.L. 95-617, 92 Stat. 3117, (PURPA), and implementing regulations of the Federal Energy Regulatory Commission. Section 210 of PURPA requires that electric utilities purchase power produced by qualifying cogenerators or small power producers which obtain qualifying status under Section 201. 16 U.S.C. §824a-3(b), (d).

Pursuant to congressional directive, the Federal Energy Regulatory Commission promulgated rules implementing Sections 201 and 210 of PURPA. FERC established requirements and procedures for obtaining qualifying facility status and eligibility for rates and exemptions. 18 C.F.R. §§292.203; 292.207. The Commission is empowered to set "avoided costs," to order electric utilities to enter into fixed term obligations to purchase energy from cogenerators and small power producers, and to implement FERC rules and regulations. PURPA Sections 210, 210(a), 210(f), 16 U.S.C. §§824a-3, 824a-3(a)(f); accord: *Afton Energy, Inc. v. Idaho Power Company*, 107 Idaho 781, 693 P.2d 427 (1984).

FERC promulgated the general scheme and rules, but left implementation to the regulatory authorities of the individual states. The grant of authority to the states in

implementing the regulation of sales and purchases between QFs and electric utilities is broad. 18 C.F.R. §§292.401; 292.301(a) (1984); PURPA §210(f), 16 U.S.C. §824 a-3(f); 45 Fed. Reg. 12230 (February 29, 1980); *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York, et al., cert. denied* 470 U.S. 1075, 1076, 105 S.Ct. 131, 85 L.Ed.2d 132 (1985). Such latitude is necessary, FERC believes, in order for implementation to accommodate local conditions and concerns. Policy Statement Regarding the FERC's Enforcement Role under §210 of the PURPA of 1978, Docket No. PL83-4-000, 23 FERC ¶ 61,304 (May 31, 1983).

PURPA Section §210(f), 16 U.S.C. §824a-3(f), provides that: "Each state regulatory authority shall . . . implement such [FERC] rule . . . for each electric utility for which it has ratemaking authority." The corresponding FERC regulation, 18 C.F.R. §292.401(a) (1980) provides that:

> Such [state] implementation may consist of
>
> [1] the issuance of regulations,
>
> [2] an undertaking to resolve disputes between qualifying facilities and electric utilities under Subpart C [arrangements between electric utilities and qualifying cogeneration and small power production facilities under §210 of PURPA], or
>
> [3] any other action reasonably designed to implement such subpart.

Accord: Federal Energy Regulatory Commission (FERC) v. Mississippi, 456 U.S. 472, 102 S.Ct. 2126, 2137, 72 L.Ed.2d 532 (1982); *Middle South Services, Inc.*, 33 FERC ¶ 61408 at 61786, 71 P.U.R. 4th 580, Opinion No. 246 (1985). This grant of authority permits the Commission to establish reasonable guidelines to determine whether a qualifying

facility has perfected its entitlement to Commission established avoided cost rates.

As a reasonable rule of implementation in exercise of the Commission's authority and jurisdiction, the Commission requires that signed contracts be submitted for review, approval and lock-in of effective rates. Alternatively the Commission requires that a complaint be filed setting forth facts "entitling" the facility to the requested relief. Empire must comply with this requirement. It is not exempt.

This commission is not seeking to impose an unlawful requirement or condition on a qualifying facility or utility. In establishing complementary standards and requirements it is merely acting pursuant to the implementing authority granted it by 18 C.F.R. §292.401(a). The use of state regulatory authorities as implementing arms of the FERC was an effort to bring regulation, implementation and administration of PURPA to the state level, to make it more accessible and to allow accommodation of local conditions and concerns. 18 C.F.R. §292.401; FERC policy statement Docket No. PL83-4-000, 23 FERC ¶ 61,304 (May 31, 1983).

2. A qualifying cogeneration or small power production facility under PURPA is not entitled to exemption from State law and regulation of sales and purchases between qualifying facilities (QFs) and electric utilities.

Empire argues that it is the exclusive province of FERC, not state regulatory authorities, to establish criteria for qualifying facility status. In part this is true. The conclusion cannot be drawn however that states are precluded from regulating qualifying facilities.

PURPA §201 paragraphs 17(C) and 18(B) of the definitions provide that the FERC shall determine by rule the qualifying requirements of a cogeneration or small power production facility. Congress explains in its comments that the purpose of the determination is to qualify for exemption under PURPA §210(e) of the Federal Power Act. Section 210(e)(l) exempts qualifying facilities in whole or in part from the Federal Power Act, from the Public Utility Holding Company Act, and from state laws and regulations respecting the traditional utility type cost-of-service regulation of rates to determine what is the just and reasonable rate that QFs should receive for their electrical power, or respecting the financial or organizational regulation, of electric utilities. 45 Fed. Reg. 33961, May 21, 1980. Of significance however, Section 210(e)(3) goes on to state:

> No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from
>
> (A) any state law or regulation in effect in a state pursuant to subsection (f) [implementation of rules for qualifying cogeneration and qualifying small power production facilities] . . .

The above language is mirrored in the implementing rules and regulations of FERC, which state that *"a qualifying facility may not be exempted from State law and regulation implementing Subpart C [the regulation of sales and purchases between qualifying facilities and electric utilities]."* 18 C.F.R. §292.602(c)(2); 18 C.F.R. §292.401. (Emphasis added.)

Empire contends that it need only comply with federal law and regulations (notice of self-certification) and not additional state standards to require an electric utility

to purchase its power. But FERC itself says the opposite. The type of regulation Empire objects to is not precluded by exemption; the Commission standards are not inconsistent with federal law; rather they are a lawful exercise of expressly delegated powers.

Although Empire would have it so, it is not the Commission's role in implementing PURPA to simply set rates and no more. As part of its unified regulatory scheme the Commission requires that signed power purchase contracts be presented to it for review, approval and lock-in of avoided cost rates. Alternatively, the Commission requires a showing of entitlement in a complaint action before it. To interpret FERC rules and regulations in such a way that the Commission is deprived of its power to determine "lock-in" of rates would be inconsistent with the Commission's PURPA implementation and avoided cost scheme. To require that a qualifying facility be entitled to lock-in a rate prior to any substantive negotiation is to create an administrative nightmare. Congress has stated that the less reliable a qualifying facility might be, the less it should be entitled to receive for purchases from it by the utility. 45 Fed. Reg. 12230, Feb. 25, 1980. How can assessment of reliability be made until the parties have negotiated and reached agreement on the essential terms? How can a contract be signed until such terms are resolved? It can not.

The assessment of entitlement and qualification must remain the function of the Commission. The Commission must remain a forum for decision and policy making. That is because the Commission has primary jurisdiction over the subject matter, the expertise and familiarity to

deal with the specialized issues of rates, siting, interconnection, safety, etc., and the authority in Complaints to determine qualifying facilities', utilities' and ratepayers' interests as part of a unified regulatory scheme.

3. The allegedly conflicting cases relied upon by Petitioner provide no supporting authority and can be easily and clearly distinguished on either law or facts.

In arguing that state regulatory authorities are preempted from establishing standards and regulating qualifying facilities, Empire cites and misinterprets *Consolidated Edison Company v. Public Service Commission of N.Y.*, 63 N.Y.2d 424, 472 N.E.2d 981 (N.Y. 1984), *appeal dismissed* 470 U.S. 1075 (1985).

The question in *Consolidated Edison* was whether a state can require utilities to pay more than the full avoided cost rate for their mandatory purchases. See 18 C.F.R. §292.304(b) (2), 45 Fed. Reg. 12214, 12222 (1980). Appellant utility challenged the law, arguing that it could not be required to pay 6¢ per kilowatt hour for the times when its avoided costs fell below that amount. Appellant relied in part on a statement in the legislative history that incremental cost was to be "an upper limit on the price at which utilities can be required . . . to purchase electric energy". Ref. H.R. Conference Report 95-1750, p. 98 (1978). The New York Court of Appeals viewed the state and federal laws as complementary rather than conflicting. The Court reasoned that independent, complementary state regulation in the field was not supplanted by PURPA but could be used to expand the federal PURPA based incentives. 472 N.E.2d at p. 985. Interestingly, in upholding the New York statute, the Court of Appeals

reached a conclusion ostensibly in conflict with the Kansas Supreme Court, another case cited by Empire, which held that state regulatory commissions can not set rates for purchases from CSPPs that are higher than avoided cost. *Kansas City Power & Light Company v. Kansas Corporation Commission*, 232 Kansas 1052, 676 P.2d 764 (1984). Despite the apparent conflict the U.S. Supreme Court refused to hear the *Consolidated Edison* case on the grounds that no federal issue was involved. 470 U.S. 1075, 105 S.Ct. 131, 85 L.Ed. 134 (1985). To contend, as suggested by Empire, that "Congress has preempted the states from [establishing standards] and regulating qualifying facilities" is to misinterpret the precedent setting authority of *Consolidated Edison*. The case under any reasonable reading cannot and should not be given such an interpretation.

Empire in Petition footnote cites the recent Orange & Rockland decision of FERC for the proposition that PURPA completely preempts states from regulating QFs. Ref. *Orange & Rockland Utilities, Inc. et al.*, FERC Docket No. EL87-53-000 43 FERC ¶ 61,067 (April 14, 1988). Such an interpretation is not supported by a reasonable reading of the decision. FERC states in O&R that to the extent that purchases from QFs are interstate wholesale transactions, the states cannot set rates exceeding avoided cost. The scope of claimed preemption was quite small.

It is difficult to determine what the holding is in *Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 734 P.2d 1366, Reh. denied 303 Or. 591, 739 P.2d 571 (1987). Suffice it to say, however, that the facts are distinguished from Empire insofar as the parties in *Snow Mountain* engaged in meaningful negotiation and the QF made a

binding offer to sell an identified amount of power from a facility of known size and capacity prior to the consensual "lock-in" of avoided cost rates.

The last case cited by Empire was *Florida Power and Light Company v. FERC*, 711 Fed. 2d 219 (D.C. Cir. 1983). This case involved a challenge of a facially valid self-certification filing of an *operating* small power production facility. In that matter FERC declined to review the qualifying status of Resources Recovery (Dade County), Inc. ("RRD") pending state court resolution of a contract dispute regarding ownership of the facility. The FERC indicated a willingness to reconsider the matter if ownership changed following resolution of the dispute. The FERC in FPL was reluctant to question the self-certification pending some change in the operation of the facility. The facts in FPL bear no similarity to the facts in Empire. Nor was the issue of law the same.

In short, none of the cases cited by Empire involve preemption of state regulatory authority and power under 18 C.F.R. §292.401(a) to enact implementing standards, rules and regulations. Nor do the cases hold that QFs are exempt from state regulation. Accordingly, no conflict exists. The Empire case, if there is an issue, deals with the reasonableness of Commission standards, rules and regulations. That is not an issue of national importance or significance. It is a factual determination the outcome of which affects only the parties to this action. It is not a matter of public concern. As the Commission stated, this is the case of a party stubbornly refusing to negotiate on anything other than its own terms, an unyielding insistence on a signed contract and "lock-in" of avoided cost rates prior to committing to project size,

capacity or location. Commission Order No. 17609, Pet. Appendix A, p. App. 7.

4. Eligibility is to be distinguished from entitlement.

In determining the eligibility of a QF for avoided cost rates it is reasonable to look to the implementing regulations and comments of FERC for guidance. In this case, Empire filed a Notice of Qualified Facility Status as a "small power producer," a self certifying process. 18 C.F.R. §292.207(a)(2). Section 201 of PURPA defines "small power production facility" as a facility producing electric energy solely by the use, as a primary energy source, of biomass, waste or renewable resources, including wind, solar energy and water. A small power production facility is a QF if it meets three criteria: . . . (1) maximum size - it may not exceed 80 megawatts; (2) fuel use - the primary energy source of the facility must be biomass, waste, renewable resources, or any combination thereof; (3) ownership - no more than 50% utility ownership test. 18 C.F.R. §§292.203(a), 292.204(a)(b), 292.206; 45 Fed. Reg. 17,963 (1980).

Having satisfied the threshold criteria, the owner or operator of the qualifying facility is required to furnish notice to FERC. 18 C.F.R. §292.207(a)(2). The information to be furnished is described in paragraphs (b)(2)(i) through (iv) of 18 C.F.R. §292.207:

(i) the name and address of the applicant and location of the facility;

(ii) a brief description of the facility including a statement indicating whether such facility is a small power production facility or a cogeneration facility;

(iii) the primary energy source used or to be used by the facility;

(iv) the power production capacity of the facility.

Empire claims that it possesses a certificate, albeit through a self-certification process, and therefore asserts that it is entitled to the benefits of qualification. "A certificate in its most general and widest sense of definition means a certain assurance of that which it states. A 'certificate' is a writing giving assurance that a thing has or has not been done, that a fact exists or does not exist, a written testimony as to the truth of any fact." 14 C.J.S. 111, Certificate; *U.S. v. Naughten*, D.C. Cal., 195 F. Supp. 157, 158 (1961). The averments contained in the Notice of Qualification or self-certification, which FERC has never investigated itself, should be entitled to no more than presumptive effect. As with all presumptions they are rebuttable with introduction of proof in contradiction. McCormick on Evidence, Burden of Proof and Presumptions Chapter 36, Section 342 Presumptions, in General p. 804 (1972).

Just as FERC may revoke the qualifying status of a certified qualifying facility if it ceases to comply with any of the statements in its Application, 18 C.F.R. §292.207(d)(l), 45 Fed. Reg. 17971 (1980), it is reasonable to infer that inquiry into the continuing qualifying status of a self-certifying qualifying facility by state regulatory authority (the Commission) is also proper. Without such inquiry there would be an award of benefits without actual determination of eligibility and entitlement.

In a letter order issued by the FERC in *Mitchell Energy Corporation*, Docket No. QF84-250-000, the FERC indicates:

> The application for certification of qualifying status . . . is hereby granted provided that the facility operates in the manner described in the application.
>
> *Certification as a qualifying facility serves only to establish eligibility for benefits* provided by the Public Utility Regulatory Policies Act of 1978, as implemented by [FERC's] regulations, 18 C.F.R. Part 292. *It does not relieve a facility of any other requirements of local, state or federal law*, including those regarding siting, construction, operation licensing and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction. (Emphasis added.)

30 FERC ¶ 61,270 (1985).

The foregoing language is typical of that contained in most FERC orders for certification of qualifying facility status. Certification as a QF does not confer any property or license rights on a facility. The primary benefits of QF status are the right to sell power to the local utility and freedom from certain regulatory constraints imposed on electric utilities. *Kooskia, Inc. dba Idapine Mills*, Docket No. QF 87-438-000, 40 FERC ¶ 62,239; *General Conservation Company of Sparrows Point, Inc.*, Docket No. QF85-536-000, 39 FERC ¶ 61,256 (June 3, 1987). It is evident that eligibility is to be distinguished from entitlement. Obtaining certification or eligibility merely qualifies a project for benefits. Entitlement to benefits, the securing of a contract and lock-in of avoided cost rates in Idaho requires further compliance with the Commission's regulatory

and procedural requirements, standards established pursuant to the implementing authority granted in 18 C.F.R. §§292.401, 292.602(c)(2).

As part of its unified regulatory scheme, the Commission has established standards and requirements for entitlement to contract and lock-in of avoided cost rates. The Commission standards of "substantial progress" and "ready, willing and able to sign a contract" and application of the "but for" test in complaint actions have been developed in the Commission's Orders, all of which are public documents on file with the Commission.

State regulatory authorities are not preempted from establishing standards and regulating qualifying facilities by requiring the designation of a site for a project and determination of the size of the project before rates are locked-in. As stated before, in establishing complementary standards and requirements the Commission is merely acting pursuant to the implementing authority granted it by 18 C.F.R. §292.401(a). The use of state regulatory authorities as implementing arms of the FERC was an effort to bring regulation, implementation and administration of PURPA to the state level, to make it more accessible and to allow accommodation of local conditions and concerns. 18 C.F.R. §292.401; FERC policy statement Docket No. PL83-4-000, 23 FERC ¶ 61,304 (May 31, 1983).

5. A "legally enforceable obligation" is not an alternative to "contract".

In compliance with PURPA Section 210(a), FERC issued regulation 18 C.F.R. §292.303(a), which provides

that "each electric utility shall purchase in accordance with §292.304 any energy and capacity which is made available from a qualifying facility." Section 292.304(d) provides:

> Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases . . . ; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term . . .

Section 292.304(d)(2) also provides that [QFs] have the option of having such energy or capacity purchased under two types of rate schedules:

> (i) the avoided cost calculated at the time of delivery; or
>
> (ii) the avoided cost calculated at the time the [legally enforceable] obligation [for the delivery of energy or capacity over a specified term] is incurred.

In discussing rates for purchases under 18 C.F.R. §292.304, FERC speaks in terms of legally enforceable obligations as triggering the utility's obligation to purchase. Empire attempts to make a distinction between "legally enforceable obligation" and "contract," intimating that a legally enforceable obligation is an alternative to obtaining a contract. This is to misinterpret the FERC rules and regulations. FERC's intent in using the term "legally enforceable obligation" is manifested by the following comments set out in the Federal Register:

> In order to defer or cancel the construction of new generating plants, a utility must obtain a commitment from a qualifying facility that provides contractual or other legally enforceable assurances that capacity from alternative sources will be available sufficiently ahead of a date on which the utility would otherwise have to commit itself to the construction or purchase of new capacity. If a qualifying facility provides such assurances, it is entitled to receive rates based on the capacity costs that the utility can avoid as a result of its obtaining capacity from the qualifying facility. . . .

45 Fed. Reg. 12,225, Feb. 25, 1980.

. . .

> In the proposed rule (§292.304(c)) the [FERC] stated that if a qualifying facility offers energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to avoid the need to construct a generating plant, to enable it to build a smaller, less expensive plant, or to purchase less firm power from another utility than it would otherwise have purchased, then the rates for purchases from the qualifying facility must include the avoided capacity and energy costs. . . . The [FERC] continues to believe that these principles are valid and appropriate, and that they properly fulfill the mandate of the statute.

45 Fed. Reg. 12,226, Feb. 25, 1980.

In reviewing the FERC's comments it is reasonable to infer that entitlement to rates under a "legally enforceable obligation" carries with it a concomitant QF obligation to provide sufficient assurances that the energy or capacity will in fact be delivered, a requisite mutuality of obligation. Accordingly, a contract (legally enforceable agreement) must be specific enough that its essential

terms can be readily ascertained. There must be specificity enough to show that the parties shared a mutual intent and it must create a mutuality of obligation and evidence an intent and willingness to rely on the agreed terms. In this case the Commission found that Empire never made a binding obligation to deliver energy. It never chose to obligate itself to provide power.

Empire wants the advantages and benefits of Commission established avoided cost rates without regulation, without negotiation. FERC does not share Empire's vision, as evidenced by the following interpretation and comment set out in 45 Fed. Reg. 33958, 33963 (May 21, 1980):

> Section 292.207(c) must be read in conjunction with §292.207(b) and §292.306. These sections provide that a utility is required to purchase power from a qualifying facility only if the facility meets all safety requirements, and pays for the appropriate interconnection costs as determined by the state regulatory authority. The 90-day requirement set out in §292.207(c) establishes a minimum time period in which a utility must purchase power from a qualifying facility which has met all other applicable safety and interconnection requirements of the regulations. A utility need not purchase power from a qualifying facility until it meets these requirements, even if the 90-day period has elapsed.

By way of further comment regarding the procedures for obtaining qualifying status under 18 C.F.R. §292.207, FERC states:

> As noted in the preamble to Order No. 70, the initiation of negotiations concerning purchase and sale arrangements allows for the flow of information between potential qualifying facilities and affected electric utilities. If a utility considers that a utility

> does not qualify, it is not obligated to purchase its electric output. In such cases, the facility may seek Commission certification under §292.207(b).

Speaking to the general requirements for qualification as set out in 18 C.F.R. §292.203 the FERC states that it believes:

> as a practical matter, an electric utility, which is notified by a QF that it wishes to interconnect with the utility in order that the utility may purchase the power produced by the facility, will need to know the nature of the QF's expected purchases and sales so as to be able to arrange for safe and reliable interconnected operation at appropriate rates.

45 Fed. Reg. 17962 (March 20, 1980).

In accordance with the foregoing, it is clear that Water Power is under no obligation to purchase until such time as Empire complies with reasonable safety and interconnection requirements. It is difficult to envision such obligation occurring until Empire engages in meaningful negotiation and commits to project size and design specification. The Commission has the authority and jurisdiction by express grant and by necessary implication to establish reasonable guidelines and rules of implementation to determine whether a qualifying CSPP facility has progressed to the point that it is entitled to the benefits of Commission established avoided cost rates. Empire has failed to comply with Commission standards and rules. It is therefore not entitled to a lock-in of Commission established rates.

6. Empire has failed to comply with Rule 21.1(h) of the Rules of the Supreme Court of the United States.

Supreme Court Rule 21.1(h) states that the Petitioner seeking review of a state court decision, in meeting this burden, must specify in the statement of the case

> "the stage in the proceedings, both in the court of first instance [the Commission] and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court, [including] such pertinent quotation of specific portions of the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give the Court jurisdiction to review the judgment on writ of certiorari."

Empire has not complied with this rule. The record is deficient as to the raising or deciding of a substantial federal question below. The Orders of the Commission and Opinions of the Idaho Supreme Court are in fact remarkably silent on the issues raised by Petitioner before this Court.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied. This case is not one that requires the exercise of the Court's extraordinary and discretionary jurisdiction.

DATED this 6 day of September, 1988.

Respectfully submitted,

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